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No. 430

IN THE

Supreme Court of the United States

October Term — 1963

CERTIFIED CREDIT CORPORATION,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

I. INTRODUCTION

This is an appeal from a judgment of the Supreme Court of Ohio entered on March 6, 1963, affirming an order of the Ohio Board of Tax Appeals.

We submit this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

II. OPINIONS BELOW

The opinion of the Ohio Supreme Court is officially reported in 174 Ohio St. 239. Opinions of the Board of Tax Appeals are not reported officially.

Copies of the opinion of the Ohio Supreme Court and the Ohio Board of Tax Appeals are appended as appendices 2 and 3, respectively.

III. JURISDICTION

The suit was brought under Section 5717.04, Revised Code of Ohio, to set aside an order of the Ohio Board of Tax Appeals, which in turn had affirmed an order of the Ohio Tax Commissioner.

The judgment of the Supreme Court of Ohio was entered March 6, 1963. The appellant filed his notice of appeal to the Supreme Court of the United States on June 4, 1963, in the Ohio Supreme Court.

Jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

Decisions sustaining this court's jurisdiction to review the judgment below by direct appeal are:

Standard Oil Company vs. Peck, 342 U.S. 382 (1952)
Gwin, White, and Prince, Inc. vs. Henneford, 305 U.S. 434 (1939)
Northwestern States Portland Cement Company vs. Minnesota, 358 U.S. 450 (1959)

IV. QUESTIONS PRESENTED

1. Whether the State of Ohio violates the Due Process Clause of the United States Constitution in taxing a corporation as if ninety-five (95%) per cent of its entire business and assets are within Ohio, when in reality that figure represents the Ohio portion of the corporation's small loan business only, and when the Ohio portion of the corporation's entire lines of business amount only to forty (40%) per cent.

2. Whether the State of Ohio violates the Commerce Clause of the United States Constitution in taxing a corporation as if ninety-five (95%) per cent of its entire business and assets are within Ohio, when in reality that figure represents the Ohio portion of the corporation's small loan

business only, and when the Ohio portion of the corporation's entire lines of business amount only to forty (40%) per cent.

V. STATUTES INVOLVED

Three statutes are involved in this proceeding:

1. Section 5725.13, Revised Code of Ohio as found in 115 Ohio Laws 574, Section 1.
2. Section 5725.14, Revised Code of Ohio, as found in 124 Ohio Laws 453, Section 3.
3. Section 5725.15, Revised Code of Ohio, as found in 122 Ohio Laws 377, Section 1.

The full text of these statutes can be found in Appendix 1 appended to this statement. The portions pertinent to this statement are discussed here, however.

Section 5725.13, Revised Code of Ohio, places a tax on the shareholders of dealers in intangibles, such as the appellant, to the extent represented by capital employed in Ohio. As pertinent, the section reads:

> "The following property shall be listed and assessed at its fair value and taxed only in the manner prescribed in sections 5725.01 to 5725.26, inclusive, of the Revised Code:
> "(A) The shares of the stockholders in an incorporated dealer in intangibles having an actual place of business in this state, to the extent represented by *capital employed* in this state; (emphasis added)
> ". . . . . ."

Section 5725.14, Revised Code of Ohio, requires the dealer in intangibles to make an annual report to the tax commissioner of Ohio showing resources and liabilities. Secondly, it defines gross receipts as follows:

> ". . . . . .
> "Gross receipts as used in this section and section 5725.15 of the Revised Code, means in the case of a dealer in intangibles principally engaged in the busi-

ness of lending money or discounting loans, the aggregate amount of *loans* effected or discounted; * * *.
"* * * * * * * * * *"

(Emphasis added)

Section 5725.15, Revised Code of Ohio, requires the tax commissioner to assess the shares of the dealer according to capital employed in Ohio. The key paragraph of that section sets out the method by which the tax commissioner is to find the extent of the capital employed in Ohio. The paragraph reads:

"* * * * * * * * * *

"If a dealer has separate offices, whether within this state only or within and without this state, the commissioner shall find the amount of capital employed in each office in this state, which shall bear the same ratio to the entire capital of such dealer, wherever employed, as the *gross receipts* of such office bears to the *entire gross receipts* of such dealer, wherever arising.
"* * * * * * * * * *"

(Emphasis added)

As gross receipts was defined in Section 5725.14, Revised Code of Ohio, to mean shall loan receipts, the Supreme Court of Ohio, in the decision below, held that the amount of "capital employed in this state", under sections 5725.13 *et seq.*, Revised Code of Ohio, should bear the same ratio to the entire capital of the corporation as the gross receipts from the *small loan* business in Ohio bears to the entire gross receipts from the *small loan* business wherever arising.

VI. STATEMENT OF THE CASE

a. Certified Credit Corporation, the Appellant

Certified Credit Corporation is an Ohio corporation, formed in 1951. It's purpose was to engage in the small loan and consumer finance business, and originally its operations were conducted primarily in those fields and within

the State of Ohio. (R-23) (Record and exhibit references are to the record made before the Ohio Board of Tax Appeals, and certified here on this appeal.)

During its first four years it engaged itself principally in setting up branch offices for consumer loans, within the state of Ohio, (R-24). Beginning about 1955, however, Certified decided to expand its operation into other states, and into other lines of business such as life insurance and real estate investment. (R-29) The great bulk of its growth occurred in 1959 and 1960.

What occurred can be seen most graphically by examining Certified's tax return made to the tax commissioner of Ohio for the years 1958, 1959, and 1960. (Exhibits A, B, and C, respectively). These show that investments in subsdiaries—

(a) in 1958 amounted to $1,663,760.97;
(b) in 1959 amounted to $4,334,907.42; and
(c) in 1960 amounted to $7,986,019.35.

(Exhibit A, page 5; Exhibit B, page 3; Exhibit C, page 5.)

Secondly, the bulk of these investments were outside of Ohio. Table II of Exhibits B and C show how Certified's resources are distributed. The most pertinent items for 1959 are—

Item	*Ohio*	*Outside Ohio*
Real estate	$241,512.23	$ 884,947.05
Investments	406,571.30	3,928,336.12

And in 1960—

Item	*Ohio*	*Outside Ohio*
Real estate	$ 437,053.28	$ 691,351.27
Investments	2,860,764.39	5,125,254.96

The movement into lines of business such as real estate, insurance, and motels can be seen by the following sampling

of subsidiaries outside of Ohio. (Exhibit B, page 3; Exhibit C, page 5):

Life Insurance Company of Mississippi
Southwestern Fidelity Life Insurance Company
Houston Financial Corporation
Candlelight Inn of Lake Charles, Inc.
Southern Marine, Inc.

In these years, Certified's small loan and consumer financing business increased only a nominal amount (R-28).

Accordingly, while Certified's Ohio small loan receipts amounted to over 90% of its total small loan receipts (gross receipts under § 5725.14), its ratio of Ohio captial to total capital was entirely different.

When Certified prepared its 1960 and 1961 tax returns, therefore, it did so according to its concept of "capital employed" in Ohio—assets, without distinction as to line of business. Under this theory—

(a) In 1959, its Ohio capital amounted to 36.29%, and
(b) In 1960, its Ohio capital amounted to 45.94%.

b. The Proceedings Below

The tax commissioner rejected the preliminary assessment and insisted on the 90% ratio.

Certified then filed an application for review and redetermination before the tax commissioner on the grounds that the tax commissioner had erred in his interpretation of "capital employed", and secondly, on the ground that if the tax commissioner's interpretation was correct, then the statutes were contrary to the Constitution of the United States, led to such a disproportionate result, and were so unreasonable and arbitrary that they should be declared null and void.

The tax commissioner affirmed his prior assessments. Certified then filed its notice of appeal to the Ohio Board of

Tax Appeals, urging the same constitutional and statutory interpretational grounds. Again, the original opinion of the tax commissioner was affirmed. Secondly, both the tax commissioner and the Board of Tax Appeals, being creatures of the legislature, asserted they had no standing to question the validity of legislation.

Certified then filed a notice of appeal to the Ohio Supreme Court assigning as error, that, among other things, the method of apportionment

a. was so unreasonable and arbitrary that it constituted the taking of property without due process of law in violation of the fourteenth amendment; and
b. was an unreasonable and arbitrary burden on interstate commerce, and that therefore, §5725.13, §5725.14, and §5725.15 violate the commerce clause of the United States Constitution and were void.

The Ohio Supreme Court affirmed the opinion of the Board of Tax Appeals.

VII. ARGUMENT

OHIO'S SCHEME OF TAXATION, BY IMPOSING A TAX THAT IN THE CIRCUMSTANCES FAILS TO HAVE ANY KINSHIP TO ACTUAL BUSINESS OR PROPERTY WITHIN THE STATE, IS REPUGNANT TO THE UNITED STATES CONSTITUTION AND VOID.

1. Under either the due process clause of the United States Constitution or the commerce clause, or both, the state may tax an enterprise carrying on business both within and without the state only if the tax is apportioned so as to have some kinship to the actual business done or property held within the taxing state.

The states may lay taxes upon companies doing interstate business, but only when the tax falls within federal constitutional limits. The problem was described by this court in *Ott vs. Mississippi Valley Barge Line Company*, 336 U.S. 169 (1949) as follows (page 174):

> "The problem under the commerce clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions * * *'. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protections conferred or afforded by the taxing state * * *"

Thus, while the essence of the due process clause may be tied to a particular state's services toward an enterprise, and the essence of the common clause is to determine what may *properly* be attributed to a particular state, in each, the resulting practical problem is one of measuring or apportioning. The problem to be resolved in each situation is that of balancing the state's need to raise revenue against the individual person's interest in living under a system

requiring due process of law and the national interest in the free flow of commerce. The cases relied on are:

Northwestern States, Portland Cement Co. vs. Minnesota 358 U.S. 450 (1959)—Commerce Clause
Gwin, White and Prince, Inc. vs. Henneford 303 U.S. 434 (1939)—Commerce Clause
Standard Oil Company vs. Peck, 342 U.S. 382 (1952)—Due Process
Union Refrigerator Transit Company vs. Kentucky 199 U.S. 194 (1905)—Due Process
Pullman's Palace Car Company vs. Pennsylvania 141 U.S. 18 (1891)—Due Process
Hans Rees' Sons, Inc. vs. North Carolina, 283 U.S. 123 (1931)—Due Process and Commerce Clauses
Ott vs. Mississippi Valley Barge Line Company 336 U.S. 169 (1949)—Due Process and Commerce Clauses

Northwestern States, Portland Cement Co. 358 U.S. 450 involved a Minnesota net income tax on an Iowa corporation which did interstate business in Minnesota. To determine what proportion of the company's net income was attributable to Minnesota, three ratios were used:

1. Minnesota's proportion of sales,
2. Minnesota's proportion of the corporation's total tangible property, and
3. Minnesota's proportion of the company's total payroll.

Here Minnesota had obviously arrived at a formula that fairly closely represented the extent to which the corporation actually did business in Minnesota.

This court found that the levy was not discriminatory but was properly proportioned to local activities within Minnesota and was therefore a sufficient nexus to support the tax. After reviewing *Bass, Ratcliff & Grettin, Ltd. vs. State Tax Commissioner* 266 U.S. 271 (1924), and *Norfolk and W.R. Company vs. North Carolina*, 297 U.S. 682 (1936), the court stated (page 460):

> "These cases stand for the doctrine that the entire net income of a corporation, generated by interstate activities, may be *fairly opportioned* among the states for tax purposes by formulas utilizing in-state aspects of interstate affairs." (Emphasis added)

Gwin, White & Prince, Inc. vs. Henneford 303 U.S. 434 involved a Washington gross receipts tax upon a Washington corporation doing interstate business as marketing agent for a federation of fruit growers. The tax was not apportioned to the company's activities within the state; accordingly, this court held the tax to be repugnant to the commerce clause, and therefore, void. The tax had been measured upon the entire interstate commerce service rendered both within and without Washington and burdened interstate commerce. If Washington, the company's domicile, could enact such a tax, so could the other states to which the commerce extended, for the privilege of conducting business within their states, leading to multiple taxation.

Standard Oil Company vs. Peck, 342 U.S. 382 is similar to the situation presented here and in *Gwin, White & Prince, Inc.*, in that the state tax was levied by the domiciliary state. Ohio levied a tax on the vessels of Standard Oil Company regardless of whether or not those vessels were engaged in commerce within Ohio. This court reasoned that since a part of the vessels could be *subject* to taxation elsewhere, Ohio had no right to tax the entire value of the vessels. That is to say, if non-domicile states could tax a company, multiple taxation would follow unless the domiciliary state was also limited to laying its taxes on an apportioned basis.

The due process feature of this subject was discussed by this court in *Union Refrigerator Transit Company vs. Kentucky* 199 U.S. 194 as follows:

> "The power of taxation, indispensible to the existence of every civilized government is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property in adding to the value of such property, or in the creation and maintenance of public conveniences * * *. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has repeatedly been held by this court to be beyond the power of the legislature and a taking of the property without due process of law. *Railroad Company vs. Jackson* 7 Wall., 262, *State Tax on Foreign Held Bonds*, 15 Wall., 300, *Tappan vs. Merchants National Bank*, 19 Wall., 490, 499; *Delaware Co. R.R. Co. vs. Pennsylvania*, 198 U.S. 341, 358."

Thus, to satisfy constitutional objections the taxing state must render an equivalent in some kind of service. This too requires measuring and apportioning.

Finally, *Hans Rees' Sons, Inc. vs. North Carolina*, 283 U.S. 123, involving both due process and commerce clause grounds, found void a North Carolina income tax laid upon corporations according to the proportion of property, both real and personal, contained in North Carolina. The evidence showed that while 83% of the corporation's property, including its manufacturing plant, were in North Carolina, only seventeen (17%) per cent of its operations were performed in that state. In its closing words, this court stated (page 135):

> "It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the facts shown, the statutory method *as applied to the appellant's business* for the year in question operated unreasonably and arbitrarily in attributing to North Carolina a percentage

> of income out of all appropriate proportion to the business transacted by the appellant in that state." (Emphasis added)

Thus the percentage of income attributed to business transacted within a state must be appropriate, it must be tied to the actualities of business transacted; and, secondly, the statutory method, no matter how fair it may appear in an abstract situation, will be struck down if found to be unreasonable and arbitrary when applied to a particular person's business.

The effect of all of these cases may be summarized as follows:

1. The tax must be apportionate according to in-state aspects of interstate affairs.
2. There must be no danger that what is being taxed will be similarly taxed in other states.
3. There should be some equivalent rendered by the taxing state in return for the state's services to the corporation.
4. The tax must not be unreasonable and arbitrary in its application in a particular situation.

The Ohio dealers in intangible tax that is the subject of this action fails on all four counts.

2. The Particular method of apportionment that Ohio has chosen, taxing at almost one hundred (100%) per cent a company the Ohio assets of which amount to less than fifty (50%) per cent, fails to bear any relation to actuality and is void.

Even Ohio apparently recognizes the requirement that its tax must be apportioned according to the taxed company's in-state activities and according to the benefits rendered. This is implicit in Ohio's direction that the company be taxed according to capital employed in the state.

The problem arose when "capital employed" was tied to small loan receipts only. In each stage of the proceedings below, the appellant, before urging the constitutional bar, argued that "capital employed" should be interpreted to mean what it is commonly understood as meaning—assets.

Though our contentions were rejected, the facts concerning Certified's assets and the ratios showing that in 1959 Certified's Ohio capital amounted to 36.29 per cent of its total assets, and that in 1960 its Ohio capital amounted to 45.94 per cent of its total assets, were never questioned; neither were its contentions that it was engaged in the life insurance, real estate, motel businesses as well as the small loan business.

By taxing the appellant as if ninety-five (95%) per cent of its business was conducted within Ohio, the state may as well be taxing the appellant at one hundred (100%) per cent. That is to say, Ohio has taxed the appellant as if one hundred (100%) per cent of its resources were within Ohio, thus taxing at one hundred (100%) per cent the appellant's Mississippi insurance company, its Louisiana motels, and its Texas real estate. This can, by no stretch of the imagination, be called a tax apportioned according to in-state aspects of a company's interstate affairs.

The appellant is not merely *subject to* taxation by other states; that taxation, as shown by exhibits E and F, which show taxes paid to foreign jurisdictions for 1959 and 1960 operations. These show that Certified paid in —

a. Indiana	Intangible, personal property, license and franchise fees
b. Louisiana	Real estate and franchise taxes
c. Texas	Franchise, real estate, personal property, and insurance premium taxes
d. Mississippi	License fees and franchise, insurance premium, real estate, and other taxes.

CONCLUSION

Clearly, there was no real apportionment.

As to the benefits rendered by Ohio, the court below stated (page 242):

> "As a small loan company it is licensed and regulated by Ohio laws. Without such a license it would be unable to engage in small loan and consumer finance business in Ohio. The Ohio small loan license law protects appellant against unregulated competition. Appellant also has available to it the processes of the state court in enforcing its legal rights. Being an Ohio corporation with its principal offices in this state, appellant receives benefits of police and fire protection and many other advantages, which it would seem unnecessary further to outline here. Obviously the advantages of these services inure to the benefit of all of appellants shareholders regardless of where they may reside."

However true this may be as related to the appellant's small loan business, the tax itself is on all of the appellant's lines of business. Thus, it misses completely the concept of taxes apportioned according to services rendered. That is to say, while Ohio's small loan laws undoubtedly protect the appellant's Ohio small loan business, what possible protection do they give the appellant's Mississippi insurance business and its Texas real estate? Similarly, Ohio's state courts, necessary though they may be in enforcing the appellant's Ohio small loan business legal rights, would fail in enforcing the provisions of a Texas lease on Texas land owned by the appellant. Certainly, these benefits do not amount to ninety-five (95%) per cent of the benefits rendered appellant's total assets.

Accordingly, we respectfully submit that the decision below should be reversed.

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APPENDIX 1

Section 5725.13, Revised Code of Ohio

The following property shall be listed and assessed at its fair value and taxed only in the manner prescribed in sections 5725.01 to 5725.26, inclusive, of the Revised Code:

(A) The shares of the stockholders in an incorporated dealer in intangibles having an actual place of business in this state, to the extent represented by capital employed in this state;

(B) The shares of the stockholders, partners, or members of an unincorporated dealer in intangibles having an actual place of business in this state, the capital stock of which is divided into shares held by the owners, to the extent represented by capital employed in this state;

(C) The property representing capital employed in this state by an unincorporated dealer in intangibles whose capital stock is not divided into shares, having an actual place of business in this state.

Section 5725.14 Revised Code of Ohio

Each dealer in intangibles shall return to the tax commissioner between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, his resources and liabilities at the close of business on the thirty-first day of December next preceding. In the case of an unincorporated dealer in intangibles, such report shall also exhibit the amount or value as of the date of conversion of all property within the year preceding the date of listing, and on or after the first day of November converted into bonds or other securities not taxed to the extent such nontaxable bonds or securities may be shown in his resources on such date, without deduction for indebtedness created in the purchase of such non-taxable bonds or securities.

If a dealer in intangibles maintains separate business offices, whether within this state only or within and without this state, said report shall also show the gross receipts from business done at each such office during the year ending on the thirty-first day of December next preceding

"Gross receipts" as used in this section and section 5725.15 of the Revised Code, means, in the case of a dealer in intangibles principally engaged in the business of lending money or discounting loans, the aggregate amount of loans effected or discounted; in the case of a dealer in intangibles principally engaged in the business of selling or buying stocks, bonds, and other similar securities either on his own account or as an agent for another, gross receipts means the aggregate amount of all commissions charged plus one per cent of the aggregate amount of all other receipts.

As used in this section and section 5725.15 of the Revised Code business is considered done at an office when it originates at such office, but the receipts from business originating at one office and consummated at another office shall be divided equitably between such offices.

An incorporated dealer in intangibles which owns or controls fifty-one per cent or more of the common stock of another incorporated dealer in intangibles may, under uniform regulations prescribed by the tax commissioner, make a consolidated return for the purpose of sections 5725.01 to 5725.26, inclusive, of the Revised Code. In such case the parent corporation making such return is not required to include in its resources any of the stocks, securities, or other obligations of its subsidiary dealers, nor permitted to include in its liabilities any of its own securities or other obligations belonging to its subsidiaries.

Section 5725.15 Revised Code of Ohio

Upon receving the report required by section 5725.14 of the Revised Code, the tax commissioner shall ascertain

and assess all the shares of such dealers in intangibles, the capital stock of which is divided into shares, representing capital employed in this state, and the value of the property representing the capital, not divided into shares, employed in this state by such dealer in intangibles, according to the aggregate fair value of the capital, surplus, and undivided profits as shown in such report, including in the case of an unincorporated dealer, the value of property converted into nontaxable bonds or securities within the preceding year, without deduction for indebtedness created in the purchase of such nontaxable bonds or securities.

If a dealer has separate offices, whether within this state only or within and without this state, the commissioner shall find the amount of capital employed in each office in this state, which shall bear the same ratio to the entire capital of such dealer, wherever arising.

The aggregate book value of the capital, surplus, and undivided profits of a dealer in intangibles as shown in such report shall be taken as the fair value thereof for the purpose of the assessment required by this section, unless the commissioner find that such book value is greater or less than the then fair value of said capital, surplus, and undivided profits. Claim for any deduction from book value of capital, surplus, and undivided profits must be made in writing by the dealer in intangibles at the time of making his return.

Whenever the commissioner assesses the fair value of the capital, surplus, and undivided profits of a dealer in intangibles at an amount in excess of the book value thereof as shown by its report, or disallows any claim for deduction from book value of such capital, surplus, and undivided profits, he shall give notice and proceed as provided in section 5711.31 of the Revised Code.

APPENDIX 2

Ohio Supreme Court Opinion

CERTIFIED CREDIT CORP., APPELLANT, *v.* BOWERS, TAX COMM., APPELLEE.

1. The amount of "capital employed in this state" (for the purpose of determining the dealer-in-intangibles tax under Section 5725.13 *et seq.*, Revised Code, upon the shares of shareholders of a corporation which acts principally as such dealer and maintains separate offices within and without this state) shall bear the same ratio to the entire capital of the corporation, wherever employed, as the gross receipts from its small-loan business at the Ohio office or offices bear to the entire gross receipts of such dealer from the small loan business, wherever arising.
2. The dealer-in-intangibles tax under Section 5725.13 *et seq.*, Revised Code, does not contravene the due process or interstate commerce clauses of the Constitution of the United States.

(No. 37500—Decided March 6, 1963.)

APPEAL from the Board of Tax Appeals.

Certified Credit Corporation, appellant here, was incorporated in 1951 in Ohio for the purpose of engaging in the small-loan and consumer financing business. In 1955, appellant decided to enter the life insurance and real estate investment business. As of December 31, 1958, appellant had $1,663,760.97 invested in ten out-of-state subsidiaries; as of December 31, 1959, after acquisition of substantial assets located in Mississippi and Texas by merger with two non-Ohio corporations, it had $4,334,907.42 invested in 18 out-of-state subsidiaries; and as of December 31, 1960, having also entered the motel business, it had $7,986,019.35

invested in 24 out-of-state subsidiaries. The record does not disclose the precise value of the various kinds of property and business engaged in by appellant or the amounts of each allocable to Ohio.

On its dealer-in-intangibles tax return for 1959 and previous years, appellant arrived at the percentage of its capital employed in Ohio by determining the relationship between receipts from its small-loan and consumer finance business within Ohio and its total gross receipts from such business and expressing the relationship as a percentage. In preparing its 1960 and 1961 dealer-in-intangibles tax returns, appellant arrived at a percentage of capital employed in Ohio by determining the ratio between capital assets located in Ohio and its total capital assets and expressing the result as a percentage. Appellant's 1959 return reported the proportion of capital employed in Ohio as 94.3 per cent of the total, whereas appellant's 1960 and 1961 returns reported the proportion of capital employed in Ohio as 36.29 per cent and 45.94 per cent, respectively. The 1960 and 1961 returns also reported that receipts from appellant's Ohio small-loan and consumer finance business constituted 95.4 per cent and 98.45 per cent, respectively, of its total small-loan and consumer finance receipts in each year.

The Tax Commissioner issued an increased assessment certificate against appellant for the year 1960, reflecting a total net worth of $5,508,661.49, with 95.41 per cent thereof being attributable to appellant's shares of stock allocable to and taxable in Ohio. For the year 1961, he issued an increased assessment certificate reflecting a total net worth of $5,760,671.75, with 98.45 per cent thereof being attributable to appellant's shares of stock allocable to and taxable in Ohio. The appellant appealed to the Board of Tax

Appeals, which affirmed the Tax Commissioner's assessments.

Messrs. Devennish & Hague and *Mr. James C. Thompson*, for appellant.

Mr. Mark McElroy, attorney general, and *Mr. John J. Dilenschneider*, for appellee.

GIBSON, J. The first question in this case is whether for the purposes of the Ohio dealer-in-intangibles tax the capital employed in this state by an Ohio corporation, which acts principally as such a dealer and maintains separate offices within and without this state, is to be determined by ascertaining the ratio of corporate assets within and without the state or by ascertaining the ratio that gross receipts from the corporation's small-loan business in Ohio bears to the entire gross receipts from its small-loan business. The answer to this question is to be found by reading Sections 5725.01 (B) and 5725.13 *et seq.*, Revised Code.

There being no question that appellant is a dealer in intangibles, principally engaged in the business of lending money or discounting loans, and that it maintains separate offices within and without this state, we turn to a consideration of the statutory provisions imposing the property tax. Section 5725.13 provides that the "fair value" of the shares of shareholders of a dealer in intangibles having an actual place of business in this state shall be taxed "to the extent represented by capital employed in this state." Section 5725.15 provides that, unless the book value of the capital is greater or less than the fair value of such capital at the time of assessment, the aggregate book value of the capital, surplus, and undivided profits of a dealer shall be the fair value for such purpose.

Having prescribed a method of ascertaining the fair value of the dealer's capital, Section 5725.15 then sets forth

a method of allocating such capital to Ohoi for tax purposes. The section provides that, where the dealer has separate offices within and without this state, the amount of capital employed in Ohio shall bear the same ratio to the entire capital of the corporation, wherever employed, as the gross receipts of the Ohio office or offices bear to the entire gross receipts of such dealer, wherever arising. Section 5725.14 defines "gross receipts", for the purpose of allocation in the case of a dealer engaged principally in the business of lending money or discounting loans, as the aggregate amounts of loans effected or discounted.

By reading Sections 5725.13, 5725.14 and 5725.15 *in pari materia*, it is clear that the tax on the shares of shareholders of a dealer in intangibles is assessed at the fair value of the capital employed in this state, allocated on the basis of the ratio of the gross receipts of the Ohio office or offices from consumer financing to the entire gross receipts from the dealer's small-loan and consumer finance business. The appellant itself so interpreted the law until it filed its 1960 and 1961 dealer-in-intangibles returns following the acquition of some substantial out-of-state properties. In our opinion the Tax Commissioner has correctly assessed the tax under the terms of the statutes.

Appellant argues that the word "capital" appearing in the phrase "capital employed in this state", as used in those sections, should be given the commonly understood meaning of "total resources" or "actual property or estate" and therefore shall be allocated on the basis of the situs of such resources or assets. In our opinion, the word "capital" as used in this statute is not subject to judicial interpretation, its meaning having been expressly set forth in Section 5725.15, which requires capital to be measured by the gross receipts from the small-loan business of the appellant.

The next question in this case is whether the method of taxation promulgated by Sections 5725.13, 5725.14, and 5725.15, Revised Code, contravenes the Constitution of the United States and, therefore, should be declared null and void. Appellant contends that the tax as applied here violates due process and is a direct burden upon interstate commerce.

With respect to due process, appellant asserts that the tax as applied here is invalid because it bears no relation to the opportunities, benefits, or protection which Ohio must give this intangible property, and cites *Standard Oil Co. v. Peck, Tax Commr.* (1952), 342 U. S., 382, and *Union Refrigerator Transit Co. v. Kentucky* (1905), 199 U. S. 194. The value of this intangible property, *i. e.*, shares of stock, depends upon the business of the company. The share of stock in and of itself has no intrinsic value. Thus, it is not the protection afforded the certificates but the benefits resulting from the protection and services rendered to the business or source of value which determines benefits for the purpose of due process.

Appellant is an Ohio corporation although it has properties in other states. As a small-loan company it is licensed and regulated by Ohio laws. Without such a license it would be unable to engage in the small-loan and consumer finance business in Ohio. The Ohio small-loan license law protects appellant against unregulated competition. Appellant also has available to it the processes of the state courts in enforcing its legal rights. Being an Ohio corporation with its principal offices in this state, appellant receives benefits of police and fire protection and many other advantages, which it would seem unnecessary further to outline here. Obviously the advantages of these services inure to the benefit of all of appellant's shareholders regardless of where they may reside.

Even though there undoubtedly are other formulae which the General Assembly could have used for allocating capital employed in Ohio, in our opinion all of appellant's shareholders, wherever they may be domiciled, do enjoy the benefits and protection of Ohio laws. We can not say that the method of allocation prescribed by the General Assembly is unreasonable. We can conclude only that the tax imposed does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

With respect to whether the tax is a direct burden upon interstate commerce, appellant points to *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U. S., 450, where an annual tax upon the taxable net income of domestic and foreign corporations was sustained. Appellant makes much of the fact that Minnesota used three ratios in determining the proportion of net income taxable, viz., (1) sales assignable to Minnesota in relation to total sales, (2) tangible property in Minnesota in relation to total tangible property, and (3) Minnesota payroll in relation to taxpayer's total payroll. However, appellant does not insist upon a three-factor ratio. In fact, it argues for a one-factor ratio and insists that the one-factor ratio should be based on the location or situs of assets. Appellant now prefers this ratio since it has acquired substantial out-of-state assets, whereas on its 1959 and earlier returns it acquiesced, at least, in the gross-receipts ratio which it now claims is unconstitutional. A remark of Mr. Justice Clark in his opinion in *Portland Cement Co.*, which is particularly pertinent, appears at page 461 where he said:

"* * * While it is true that a state may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of

the state government in return for the benefits it derives from within the state. * * *"

In *Ford Motor Co. v. Beauchamp, Secy. of State* (1939), 308 U. S., 331, a Texas corporate franchise tax measured by the ratio the gross receipts of the company's Texas business bore to its total gross receipts was upheld against a claim of undue burden on interstate commerce. The court noted that in a unitary enterprise, as existed there and exists here, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege of engaging in interstate business. There is no basis for concluding that the tax imposed by Ohio statute, which requires capital employed in Ohio to be allocated on the basis of a gross-receipts ratio, unreasonably burdens interstate commerce.

Appellant shows that it pays taxes in other states, but there is no evidence as to how these taxes are measured or what formulae are used. In our opinion, there is no evidence to show that Ohio is taxing more than its fair share of the "capital employed in this state" by the appellant.

The decision of the Board of Tax Appeals, being neither unreasonable nor unlawful, is affirmed.

Decision affirmed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, GRIFFITH and HERBERT, JJ., concur.

APPENDIX 3

BEFORE THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION
STATE OF OHIO

CERTIFIED CREDIT CORPORATION, 30 EAST TOWN ST., COLUMBUS, OHIO

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

ENTRY

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein under date of August 21, 1961, by the appellant above named from two separate final orders of the Tax Commissioner, both dated July 28, 1961. In Final Order No. 8971 the Tax Commissioner confirmed an increased assessment theretofore made against appellant as a dealer in intangibles for the year 1960, and in Final Order No. 9094 the Tax Commissioner confirmed the preliminary assessment made against appellant as a dealer in intangibles for the year 1961.

This matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript supplied by the Tax Commissioner, the testimony and evidence presented at a hearing before this Board in Columbus, Ohio, on October 25, 1961, and briefs of counsel.

Certified Credit Corporation, an Ohio corporation, was formed in 1951 as a small loan business, and, during its prosperous years, this corporation has increased its assets

on a national scale acquiring several life insurance companies and real estate holdings to the point that its share values are presently in excess of eight million dollars.

On its dealer in intangibles tax return for 1960 appellant computed the Ohio proportion of the book value of its shares at 36.29% ($1,978,861.98), and on its dealer in intangibles tax return for 1961 appellant computed the Ohio proportion of the book value of its shares at 45.94% ($2,639,914.24).

The Tax Commissioner, in his final order, No. 8971, made the following corrections on appellant's 1960 tax return:

(1) added to the total assets certain assets, which appellant had omitted, having a value of $6,482.03;

(2) reduced the dollar amount of appellant's reserve for bad debts by the sum of $55,748.88;

(3) increased the Ohio proportion of book value of appellant's shares from 36.29% ($1,978,861.98) to 95.41% ($5,255,814.00).

In Final Order No. 9094, which confirmed the preliminary assessment certificates (Page 28, Tax Commissioner's transcript), the Tax Commissioner listed the total value of appellant's shares at $5,760,671.75, and the Ohio proportion of that total value was listed at $5,671,382.00 or 98.45%. The total value of appellant's shares was arrived at from figures furnished by appellant to the Tax Commissioner on appellant's 1961 tax return (Page 19, Tax Commissioner's transcript) and is the same dollar amount listed by the appellant on its own books and records as the value it (appellant) ascribed to said shares.

Final Order No. 9094 states that the Tax Commissioner, in making said assessment, disallowed a portion of appellant's reserve for bad debts; however, in fact, that official did not reduce appellant's bad debt reserve. The appellant's bad debt reserve for the year 1961 was allowed in

the sum of $124,113.04, being the same amount listed by appellant on its 1961 tax return as an allowable reserve for bad debts.

The appellant, in its notice of appeal, alleges that the final orders of the Tax Commissioner are erroneous in the following particulars:

"1. That the Tax Commissioner erred in restricting the interpretation of the word 'capital' as used in Section 5725.13 et seq. of the Revised Code of Ohio, to mean only the Capital Stock and surplus.

"2. That the Tax Commissioner erred in rejecting appellant's contention that Section 5725.15 of the Ohio Revised Code is inoperative and meaningless in that it is irreconcilable and inharmonious with other sections of the Ohio Revised Code and more particularly with Section 5725.13 of the Revised Code.

"3. That the Tax Commissioner erred in rejecting appellant's contention that Section 5725.14 is in conflict, with other sections of TITLE LVII and with the taxing policy of the State of Ohio, and is, therefore, inoperative and meaningless.

"4. That the Tax Commissioner erred in failing to find that the method of taxation of dealers in intangibles as set forth in Sections 5725.13, 5725.14, and 5725.15 of the Ohio Revised Code is contrary to the Constitution of the United States in that the method of apportionment of the tax is so unreasonable and arbitrary and leads to such a palpably disproportionate result that it constitutes a taking of property without due process of law in violation of the 14th Amendment.

"5. That the Tax Commissioner erred in failing to find that the method of apportionment, or the lack of a true apportionment of the tax is an unreasonable and arbitrary burden on interstate commerce, and Sections 5725.13, 5725.14, and 5725.15, Ohio Revised Code, as applied to the Certified Credit Corporation, are violative of the Commerce Clause of the United States Constitution, and are, therefore, null and void.

"6. That even if the Tax Commissioner has no authority, as contended in his decision, to find sections 5725.13, 5725.14, and 5725.15 of the Revised Code unconstitutional, this appellant nevertheless assigns as

error the assessment of the taxes on the basis that the aforementioned statutes are unconstitutional for the reasons mentioned in assignments of error five (5) and six (6) above.

"7. That the Tax Commissioner erred in his finding that appellant had claimed an excessive reserve for bad debts."

There is no testimony or evidence of error, nor does the taxpayer allege any error, by the Tax Commissioner wherein that official:

(1) increased the appellant's total assets on its 1960 return by adding omitted assets having a value of $6,482.03;

(2) disregarded appellant's claim for an increase in the book value of its leasehold improvements and a decrease in the book value of furniture and fixtures of $20,877.09, which, if allowed, would have reflected a net decrease in the total value of appellant's shares of $14,232.39 ($5,760,671.75 minus $5,746,439.36) (See Page 25, Tax Commissioner's transcript);

and, therefore, this Board hereby affirms these actions of the Tax Commissioner.

In order that all taxpayers may be treated in a just and equal manner the Tax Commissioner has issued an administrative ruling containing a formula to be used in the computation of the dollar amounts allowable to a taxpayer as a reserve for bad debts. This administrative ruling of the Tax Commissioner is as follows:

"An allowable percentage for bad accounts reserve has been adopted by the Department of Taxation and is computed in the following manner: the total amount of bad debts charged off, less recoveries for the preceding five (5) years divided by the total amount of business on account or loans effected, discounted, or renewed for the preceding five (5) years. To this is added one-half (½) of one per cent (1%) as a correction factor. The resulting percentage will be ap-

plied to the gross amount of accounts and notes receivable owned.

"In the event the taxpayer contends that the book value of accounts and notes receivable is in excess of the fair value thereof, a claim for deduction from such book value must be submitted on form No. 981 at the time of filing the tax return. Should the reserve for bad accounts, as maintained in the books and records of the taxpayer, reflect a percentage in excess of that allowed by the Department of Taxation, the resulting book value of accounts and notes receivable will be subject to a fair value increase."

The above-quoted bad debt reserve formula, used by the Tax Commisioner in the determination of the fair value of appellant's accounts receivable, has been passed on by the Ohio Supreme Court and approved in the following cases: *Capital Finance Corporation v. Glander, Tax Commissioner*, 153 Ohio St., 50; *Personal Finance Co. v. Glander, Tax Commissioner*, 156 Ohio St., 379; *Allied Building Credits, Inc. v. Bowers, Tax Commissioner*, 170 Ohio St., 334.

The appellant's tax return for the year 1960 listed a reserve for bad debts in a total amount of $103,316.90. The Tax Commissioner, after applying the above-quoted formula, arrived at the sum of $47,568.02 as an allowable reserve for bad debts. It has since developed that appellant's actual losses for 1960, as a result of bad debts, amounted to the sum of $32,675.89, which is $14,892.13 less than the sum allowed by the Tax Commissioner. It should also be noted that appellant's annual bad debt loss for the previous five years was as follows:

1955 — $21,276.61
1956 — 30,058.68
1957 — 42,482.48
1958 — 28,210.26
1959 — 37,472.60

Despite the fact that appellant's actual losses from bad debts for 1960 amounted to only $32,675.89, and the Tax Commissioner already allowed $47,568.02, the appellant claims that the allowable reserve for bad debts for the year 1960 should be increased to $103,316.90.

The testimony of appellant's treasurer and only witness, Robert Savage, was that appellant, in arriving at its bad debt reserve, had multiplied its total loans by a percentage and that this percentage was arrived at by somebody who adjusted someone else's original guess.

Giving this testimony and evidence the highest consideration possible, and keeping in mind that appellant's actual loss was $14,892.13 less than the sum allowed by the Tax Commissioner as a reserve for bad debts, this Board is unable to find that the evidence, as offered, was of probative value indicating that appellant is entitled to a greater reserve for bad debts than the sum that has already been allowed by the Tax Commissioner.

The Board of Tax Appeals, therefore, affirms this portion of the Tax Commissioner's final order, No. 8971.

The pertinent portion of Ohio Revised Code Section 5725.13, applicable to appellant herein, is as follows:

> "The following property shall be listed and assessed at its fair value and taxed only in the manner prescribed in sections 5725.01 to 5725.26, inclusive, of the Revised Code:
>
> "(A) The shares of the stockholders in an incorporated dealer in intangibles having an actual place of business in this state, to the extent represented by capital employed in this state;"

The pertinent portion of Ohio Revised Code Section 5725.14 applicable to appellant herein is as follows:

> "Each dealer in intangibles shall return to the tax commissioner between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, his resources and liabilities

at the close of business on the thirty-first day of December next preceding. * * *.

"If a dealer in intangibles maintains separate business offices, whether within this state only or within and without this state, said report shall also show the gross receipts from business done at each such office during the year ending on the thirty-first day of December next preceding.

" 'Gross receipts' as used in this section and section 5725.15 of the Revised Code, means, in the case of a dealer in intangibles principally engaged in the business of lending money or discounting loans, the aggregate amount of loans effected or discounted; * * *.

"As used in this section and section 5725.15 of the Revised Code business is considered done at an office when it originates at such office, but the receipts from business originating at one office and consummated at another office shall be divided equitably between such offices.

"An incorporated dealer in intangible which owns or controls fifty-one per cent or more of the common stock of another incorporated dealer in intangibles may, under uniform regulations prescribed by the tax commissioner, make a consolidated return for the purpose of sections 5725.01 to 5725.26, inclusive, of the Revised Code. In such case the parent corporation making such return is not required to include in its resources any of the stocks, securities, or other obligations of its subsidiary dealers, not permitted to include in its liabilities any of its own securities or other obligations belonging to its subsidiaries."

The pertinent portion of Ohio Revised Code Section 5725.15 is applicable to appellant herein, as follows:

"Upon receiving the report required by section 5725.14 of the Revised Code, the Tax Commissioner shall ascertain and assess all the shares of such dealers in intangibles, the capital stock of which is divided into shares, representing capital employed in this state, and the value of the property representing the capital, not divided into shares, employed in this state

by such dealer in intangibles, according to the aggregate fair value of the capital, surplus, and undivided profits as shown in such report, including in the case of an unincorporated dealer, the value of property converted into nontaxable bonds or securities within the preceding year, without deduction for indebtedness created in the purchase of such non-taxable bonds or securities.

"If a dealer has separate offices, whether within this state only or within and without this state, the commissioner shall find the amount of capital employed in each office in this state, which shall bear the same ratio to the entire capital of such dealer, wherever employed, as the gross receipts of such office bears to the entire gross receipts of such dealer, wherever arising.

"The aggregate book value of the capital, surplus, and undivided profits of a dealer in intangibles as shown in such report shall be taken as the fair value thereof for the purpose of the assessment required by this section, * * *."

Specifications of Error Nos. 2 and 3 allege that two of the above-noted statutes are inoperative and meaningless, and Specifications of Error Nos. 4, 5 and 6 allege that all of these above-noted statutes are unconstitutional. This Board, being a statutory body, has no authority to find statutory legislation null and void or unconstitutional, and therefore Specifications of Error Nos. 2, 3, 4, 5 and 6 will not be given further consideration.

Specification of Error No. 1, *supra*, is as follows:

"1. That the Tax Commissioner erred in restricting the interpretation of the word 'capital' as used in Section 5725.13 et seq. of the Revised Code of Ohio, to mean only the Capital Stock and surplus."

Revised Code Section 5725.13, *supra*, provides for taxation of the shares of an incorporated dealer in intangibles to the extent represented by *capital* employed in Ohio.

In order to compute appellant's tax liability in accordance with the provisions of Revised Code Section 5725.13, *supra*, two things must be known:

(1) which of the items listed on the corporate balance sheet comprise the *capital* of the corporation as that term (capital) is used in Section 5725.13;

(2) The formula or method which the Tax Commissioner must use to determine the representative amount of capital employed within Ohio by the appellant corporation.

Ballentine's Law Dictionary, Second Edition, at Page 187, defines "capital" as follows:

> "capital. That portion of the assets of a corporation, regardless of their source, which is utilized for the conduct of the corporate business and for the purpose of deriving therefrom gains and profits."

The Tax Commissioner has construed the word "capital" to mean only the net worth of the corporation. It is difficult to understand how such an interpretation of the word "capital", as used by the Tax Commissioner, could possibly act to the detriment of the taxpayer as it appears that the inclusion of the total available assets of the corporation, within the definition of capital, would create a larger tax base against which the tax rate would be multiplied, and the resulting dollar amount of the tax would necessarily be larger. This Board is certain that appellant is not attempting to increase the amount of its tax beyond the amount already assessed by the Tax Commissioner.

It is the opinion of this Board that the Tax Commissioner's definition of capital (net worth) is a correct interpretation and determination by that official of the meaning of the word "capital" as that word is used in Section 5725.13 of the Revised Code.

The language in Revised Code Section 5725.15 makes it impossible for the Tax Commissioner to exercise any discretion, whatsoever, in determining the representative portion of the corporation's capital employed in this state, as the second paragraph of that section sets forth a mandatory formula for determining the percentage of the corporation's total capital which is to be taxed, as capital employed in Ohio. The second paragraph of Section 5725.15 is as follows:

> "If a dealer has separate offices, whether within this state only or within and without this state, the commissioner shall find *the amount of capital employed in each office in this state*, which *shall bear the same ratio to the entire capital of such dealer, wherever employed, as the gross receipts of such office bears to the entire gross receipts of such dealer, wherever arising.*" (Emphasis added by B.T.A.)

This is exactly the method used by the Tax Commissioner when he determined that 95.41% of appellant's capital was attributable to Ohio for the year 1960 and that 98.45% of appellant's capital was attributable to Ohio for 1961.

The Board of Tax Appeals finds that the Tax Commissioner in computing appellant's tax liability as a dealer in intangibles for the years 1960 and 1961, has complied with the express provisions of Revised Code Sections 5725.13, 5725.14, and 5725.15.

Therefore, the Board of Tax Appeals finds that the final orders of the Tax Commissioner, herein complained of, should be, and hereby are, affirmed.

[Duly certified.]